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No. 84-1618

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

GARY ALAN KOPCZYNSKI
Petitioner,

VS.

THE JACQUELINE, DOCUMENTATION NO. 519060,
HER ENGINE, TACKLE, APPURTENANCES,
ETC., IN REM,
SEAWARD MARINE SERVICES, INC.,
et al.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT SEAWARD MARINE SERVICES, INC. IN OPPOSITION

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QUESTION PRESENTED

In a claim brought under the Jones Act, 46 U.S.C. § 688, by a seaman, can failure of the shipowner to comply with certain regulations made for the protection of harbor workers, under the Longshoremen's and Harbor Workers' Compensation Act, which state that they apply neither to crewmembers nor to shipowners as their employers, be invoked against the shipowner, as the basis for a contention (not decided nor preserved for decision below) that the jury's reduction of damages for contributory negligence of the seaman should have been prohibited?

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STATEMENT OF THE CASE

The Statement of the Petitioner is substantially correct as to most of the objective facts. Petitioner was a diver employed by Respondent[1] at the time of his injury as a seaman and crewmember on a small vessel used as a diving platform and base for hydraulic cleaning machines. He claimed that he was a seaman, and brought suit as a seaman and crewmember under the Jones Act, 46 U.S.C. § 688.[2] He does not deny here that he is a

[1] Respondent has no parent companies, subisidiaries, or affiliates.

[2] He claimed also that the vessel was unseaworthy but the jury found against him on that issue, the Ninth Circuit affirmed, and the point is not before this Court.

seaman and crewmember, nor does Respondent challenge this premise of his recovery.

Petitioner was injured when standing on the rail of the vessel, either in connection with discharging some empty drums or in the process of getting off the vessel and onto a pier. It is not clear which.

In the district court, Petitioner sought to assert a regulation contained in 29 C.F.R. Part 1915, and argued that it was a safety statute within the meaning of 45 U.S.C. § 53 and that Respondent's failure to satisfy the regulation precluded any reduction of damages on account of Petitioner's own contributory negligence. The district judge rejected those submissions because of the limitations on application contained in the regulations themselves. He instructed the jury on the principles of comparative fault and gave it a special verdict form including a question as to the percentage of contributory negligence. Petitioner failed to object to the instructions on the ground which he now urges. He made only the different, very general and false assertion that comparative negligence did not apply to seamen's claims for unseaworthiness or for negligence under the Jones Act. (Rep. Trans. 750.)[3] The jury found Respondent negligent and Petitioner 35% contributorily negligent, and also reached conclusions on other questions not relevant here. Judgment was entered on the verdict.

The judgment was satisfied as to compensatory damages, and cross-appeals were taken on the issue presented here, as well as on certain other issues not here presented. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the district court as to the issue presented here,[4] agreeing that the regulations in Part 1915 did not apply to a seaman and reserving

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[3] Even that assertion was not made after the instructions were given, but at the earlier conference in chambers. It was agreed, however, with the court's approval, that objections made during that conference would be deemed to have been repeated after the instructions were given. (Rep. Trans. 802.)

[4] The Court of Appeals went directly to the merits without addressing Respondent's contention, made there as here, that the point had not been properly preserved for appeal, since the application of the regulations was relevant to another contention made there and not here. See *infra* p. 3.

for another day the question of whether "the violation of an [applicable] safety statute or regulation might preclude consideration of an injured seaman's comparative negligence in a Jones Act cause." Pet. p. A-5.

REASONS FOR DENYING THE PETITION

I

THE POINT PETITIONER WISHES TO RAISE HERE WAS WAIVED AND NOT PRESERVED FOR APPEAL

The record below reveals that the point Petitioner seeks to make here was not even preserved for consideration in the Court of Appeals. He seeks here to apply one of the OSHA regulations for shipyard workers in order to contend that the jury should not have been instructed and allowed to make a deduction for his contributory negligence. This is a point which came to a head in the Jury Instructions. Rule 51 of the Federal Rules of Civil Procedure requires a party objecting to an instruction to state "distinctly the matter to which he objects and the grounds of his objection". The objection made by Petitioner was nothing more than this: "Plaintiff's position is still that contributory negligence and comparative negligence are not properly applied to the seamen in an unseaworthy condition under the Jones Act". (Rep. Trans. 750.) That objection was not only quite distinct from the point which Petitioner wants this Court to review, but was itself completely incorrect, *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424 (1939). Rule 51 makes it absolutely clear that when a proper objection is not made the error, if any, is waived. The court below no doubt considered the applicability of the regulation anyway because the Petitioner there also asserted it for a second purpose, which was to support a claim of error in excluding the regulation as evidence of unseaworthiness. See Pet. p. A-8. That point is not before this Court.

II

THE RECORD DOES NOT PRESENT AN ACTUAL CONFLICT BETWEEN COURTS OF APPEALS

Petitioner's claim, Pet. pp. 6-7, that there is a conflict between decisions of the Courts of Appeals of the Ninth Circuit and the Second Circuit is refuted by an examination of the cases. It will

show that the regulations invoked in this case are excluded by limitations in the regulations themselves and the statute under which they were enacted, and that those limitations were absent in the Second Circuit case said to be in conflict.

The regulation which Petitioner claims is relevant in the present case, 29 C.F.R. § 1915.74, is contained in Part 1915 entitled "Occupational Safety and Health Standards for Shipyard Workers", a Part with very specialized application (as the title implies) issued pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 941.

The LHWCA applies only to "employees", who are defined as not including "a member of a crew of any vessel". 33 U.S.C. § 902(3). The regulations themselves repeat the point in slightly different language.[5] The regulations also explicitly state that they do not apply to owners of vessels unless "acting as employers" (29 C.F.R. § 1915.3(b)) and they define an "employer" as one with "employees" (§ 1915.4(c)), who have already been defined to exclude crewmembers.[6]

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[5] 33 U.S.C. § 902(3) provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

29 C.F.R. § 1915.4(d) provides:

> The term "employee" means any person engaged in ship repairing, shipbuilding, shipbreaking or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to repair any vessel under 18 tons.

[6] 29 C.F.R. § 1915.4(c) provides:

> The term "employer" means an employer, any of whose employees are employed, in whole or in part, in ship repairing, shipbuilding, shipbreaking or related employments as defined in this section on the navigable waters of the United States, including dry docks, graving docks and marine railways.

Section 941(a) of the LHWCA provides that "the Secretary may not make determinations by regulation or order under this section as to matters within the scope of title 52 of the Revised Statutes and Acts supplementary or amendatory thereto . . .", i.e., within the scope of the laws codified as Title 46 of the United States Code which regulates the affairs of ships and seamen. The regulations carry out this restriction by stating that Part 1915 "does not apply to matters under the control of the United States Coast Guard within the scope of Title 52 of the Revised Statutes and acts supplementary or amendatory thereto (46 U.S.C. secs. 1-1388) including, but not restricted to, . . . crewmembers . . .". 29 C.F.R. § 1915.2(b).

The Court of Appeals in the present case observed the specific restrictions of the LHWCA and Part 1915 of the regulations, noted that Petitioner was a seaman and crewmember, and drew the correct conclusion that the regulation he invoked had no application in this case. The court also noted the more general restriction upon all OSHA regulations imposed by 29 U.S.C. § 653(b)(1), based on the exercise of statutory authority by another agency, a general restriction which had been held in several cases cited by the court to exclude the application of various OSHA regulations to seamen. In view of the specific inapplicability of the particular regulation invoked here, the citation by the court below of the more general restriction, 29 U.S.C. § 653(b)(1), is no more than a dictum, the reversal of which would have no effect upon the present case, even apart from the further question whether a breach of the relevant regulation would have any effect upon the law of contributory negligence. The latter was a question which the court below never reached.

Donovan v. Red Star Marine Services, Inc., 739 F.2d 774 (2d Cir. 1984), Pet. p. C-1, *cert. denied,* 53 U.S.L.W. 3617 (Feb. 26, 1985), the only case that Petitioner asserts is contrary to the decision in the present case, was a review of a final administrative order involving a very different regulation, 29 C.F.R. § 1910.95, which concerns noise levels in the work place, and the issue was whether that regulation applied to a tugboat, a vessel not inspected by the Coast Guard.

The only argument available to the vessel owner in *Red Star Marine* was that the OSH Act, at 29 U.S.C. § 653(b)(1),

exempted the tugboat from the operation of 29 C.F.R. § 1910.95, because the Coast Guard, in the language of the statute, exercised "statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health", Pet. p. C-6. The court decided that the Coast Guard was not in fact exercising that authority over uninspected vessels such as the Red Star Marine tug, and thus that 29 U.S.C. § 653(b)(1) did not exempt the tug from OSHA regulation 29 C.F.R. § 1910.95. The court therefore reversed the order of the Occupational Safety and Health Review Commission that had denied enforcement.

The regulation involved in *Red Star Marine* is in part 1910: "Occupational Safety and Health Standards", a part of the C.F.R. with the broadest application, promulgated under a Congressional mandate to set nationwide standards. *See* 29 C.F.R. § 1910.1. The regulation was not subject to the restrictions involved here against application to seamen and their shipowner-employers. Part 1910 includes definitions of "employer" and "employee", § 1910.2 (c) and (d) respectively, much broader than the definitions in Part 1915 which are relevant to this case. Thus there is no actual conflict between the Second Circuit decision applying § 1910.95 despite the general restriction in the OSH Act and the decision in the present case declining to apply § 1915.74 because of the particular restrictions in LHWCA and 29 C.F.R. Part 1915.

This Court denied a petition for certiorari in the Second Circuit case, *Red Star Marine*. 53 U.S.L.W. 3617 (Feb. 26, 1985). The United States, as respondent in that case (No. 84-590), pointed out in its brief (pp. 10-12) that the three cases cited by the Court of Appeals in this case, Pet. p. A-6,[7] were not actually in conflict with *Red Star Marine*. Moreover, the United States pointed out (p. 12) that the decision of the court below in this case was not in conflict with *Red Star Marine* because the regulation involved here "expressly excluded seamen from coverage." There is no more reason to review the general issues adumbrated by Petitioner now than there was then, and the present case does not provide the opportunity to do so.

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[7] Donovan v. Texaco, Inc., 720 F.2d 825 (5th Cir. 1983); Taylor v. Moore-McCormack Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling & Exploration Co., 609 F.2d 1120 (5th Cir. 1980).

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW HERE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Petitioner refers explicitly only to Supreme Court Rule 17.1(a), claiming a conflict with the decision of another Court of Appeals as a ground for grant of his Petition, Pet. p. 7, but some passing remarks in the Petition, Pet. p. 6, might be interpreted as an invocation of Supreme Court Rule 17.1(c), referring to important federal questions not settled by this Court.

There is no such question in this case. Comparative fault has long been the established rule in Admiralty, and the rule of reduction of damages for comparative fault in personal injury suits, whether on the basis of unseaworthiness or the Jones Act, is an application of this Admiralty rule. *See Socony-Vacuum Oil Co. v. Smith.* There is not the slightest reason to suppose that the OSH Act was intended to alter this rule.

The present case was a routine seaman's injury case involving a regrettable injury but raising no new, interesting or important question of law concerning the relationship of regulations and damages. The legal principles of Jones Act claims are well-settled, the decision below was sound, and the present case does not merit the attention of this Court.

If the application of certain general OSHA regulations to uninspected vessels is an important question, it will not be reached in this case where the regulation invoked is expressly restricted.

CONCLUSION

For the foregoing reasons we submit that the petition should be denied.

Respectfully submitted,

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